United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

77-7188

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REGAL HEALTH SPA, INC.,

Plaintiff-Appellant,

-against-

JEREMIAH T. WALSH, as Commissioner of the City of New York, Department of Buildings, PAUL O'DWYER, as President of the New York City Council HONORABLE LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, and HONORABLE HUGH CAREY, as Governor of the State of New York,

Defendants,

JEREMIAH T. WALSH,

Defendant-Appellee.

B

P/S

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York

---

APPELLEE'S SUPPLEMENTAL BRIEF

UNITED STATES COURT OF APPEALS
FILED
NOV 10 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

W. BERNARD RICHLAND,
Corporation Counsel
Attorney for Defendant-Appellee
Municipal Building
New York, N.Y. 10007
566-4337 or 3323

LEONARD KOERNER,
LAURENCE B. JONES,

of Counsel.

TABLE OF CONTENTS

	Page
Statement ----------	1
Argument	
Point I	
APPELLANT WAIVED THE ISSUES RAISED IN ITS SUPPLEMENTAL BRIEF BY HAVING FAILED TO ASSERT THEM IN THE DISTRICT COURT OR ON APPEAL TO THIS COURT, IN ITS MAIN BRIEF OR IN A REPLY BRIEF --------	3
Point II	
THERE IS A STATE CRIMINAL AND CIVIL PROCEEDING PENDING WHEREIN APPELLANT CAN FULLY LITIGATE ITS CONSTITUTIONAL CLAIMS. THEREFORE, THIS COURT SHOULD ABSTAIN PURSUANT TO YOUNGER v. HARRIS --=-	5
Conclusion ----------	9

TABLE OF AUTHORITIES

	Page
Federal Cases	
Cratty v. United States, 163 F. 2d 844 (D.C. Cir., 1947)	3
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	6
Juidice v. Vail, 97 S. Ct. 1211 (1977)	6
Trainor v. Hernandez, 97 S. Ct. 1911 (1977)	6
United States v. White, 454 F. 2d 435 (7th Cir., 1972)	3
United States v. Williams, 378 F. 2d 665 (4th Cir., 1967)	3
Younger v. Harris, 401 U.S. 37 (1971)	6
State Cases	
People v. Gillman, 6 AD 2d 899 (2nd Dept., 1958)	7
People v. Namro Holding Corp., 10 AD 2d 702 (1st Dept., 1960), aff'd 8 N.Y. 2d 1131 (1960)	7
Statutes	
Federal Rules of Appellate Procedure §§28(a)(2), 28(c)	3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REGAL HEALTH SPA, INC.,

Plaintiff-Appellant,

-against-

JEREMIAH T. WALSH, as Commissioner of the City of New York, Department of Buildings, PAUL O'DWYER, as President of the New York City Council, HONORABLE LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, and HONORABLE HUGH CAREY, as Governor of the State of New York,

Defendants,

JEREMIAH T. WALSH,

Defendant-Appellee.

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York.

STATEMENT

This brief is submitted in response to appellant's supplemental brief.*

---

*Although appellant entitles his brief as a "reply", it is supplemental as it addresses issues appellant raised for the first time either on oral argument or herein.

At oral argument, this Court granted appellant permission to submit a supplemental brief on an issue it first raised at that time. The brief was to be served and filed by Friday afternoon., November 4 or Saturday morning at the latest. Appellant served appellee on Monday November 7 at 4:49 p.m. Appellants' brief was, therefore, three days late.

At oral argument appellant claimed for the first time that it could not litigate the issue of the constitutionality of the Zoning Resolution in the pending state criminal proceeding. At Point II of its supplemental brief, it cites several New York cases in support of this contention. In addition, at Point I of the Supplemental brief, appellant raises for the first time, having failed to make this claim even on oral argument, that Sari Rucker, not appellant, is the defendant in state court.

POINT I

APPELLANT WAIVED THE ISSUES RAISED IN ITS SUPPLEMENTAL BRIEF BY HAVING FAILED TO ASSERT THEM IN THE DISTRICT COURT OR ON THE APPEAL TO THIS COURT, IN ITS MAIN BRIEF OR IN A REPLY BRIEF.

As appellant conceded on oral argument before this Court, the claim that it cannot attack the constitutionality of the Zoning Resolution in state criminal court was not raised in District Court. Not only did appellant fail to do so in the court below, but also it failed to raise the issue in its brief to this Court. Appellant could have submitted a reply brief before the argument, as provided by Federal Rules of Appellate Procedure §28(c), but did not bother to do so. Rather this issue was raised for the first time on oral argument to this Court.

Rule 28(a)(2) of the Federal Rules of Appellate Procedure requires that the brief include " a statement of the issues presented for review." This has been interpreted to require all issues be set out in appellant's brief and (appellee's) answer and failure to comply may constitute waiver. United States v. White, 454 F. 2d 435, 439 (7th Cir., 1972). See also United States v. Williams, 378 F. 2d 665, 666 (4th Cir., 1967); Cratty v. United States, 163 F. 2d 844

(D.C. Cir., 1947). We submit, therefore, that appellant has waived this issue.

There are no exceptional circumstances to warrant a departure from this rule. While appellant's attorney attributes his failure to the fact that he was substituted for the original attorney shortly before the oral argument, this is not a valid excuse. To hold otherwise would be to permit a party to raise new issues at the late date of oral argument or even later, as evidenced by appellant's interjecting a new claim not even raised on oral argument, by merely shifting attorneys. Surely, such an action should not be countenanced.

POINT II

THERE IS A STATE CRIMINAL AND CIVIL PROCEEDING PENDING WHEREIN APPELLANT CAN LITIGATE ITS CONSTITUTIONAL CLAIMS. THEREFORE, THIS COURT SHOULD ABSTAIN PURSUANT TO YOUNGER v. HARRIS.

Assuming, arguendo, that the assertion of these issues is timely, they are nevertheless without merit.

The summons was issued by Mr. Tricomi for violation of the "Zoning Resolution and the provisions of the Violation Order" (A51). The Summons clearly states that the charge was for violation of section 81-021 of the Zoning Resolution (See A53)*. Finally, the information also states that it is predicated upon Section 81-021 of the Zoning Resolution (See Information handed to this Court at oral argument). Therefore, appellant can raise the issue of the constitutionality of Zoning Resolution §81-021 as a defense in the pending state criminal proceeding because it was charged with violation of that resolution.

---

*Failure to comply with the earlier violation order is listed on this notice as an offense in addition to the violation of the Resolution. (See A 53).

In addition to this criminal proceeding, there is a civil proceeding pending in New York State Supreme Court, New York County, against appellant to enjoin its continued violation of Section 81-021 of the Zoning Resolution. (Walsh v. Regal Health Spa, Inc., Index No. 40977/1977)*. The principles of Younger are applicable when the pending state proceeding is civil in nature, based upon the notion of "comity". Trainor v. Hernandez, 97 S.Ct. 1911, 1916 (1977); Juidice v. Vail, 97 S. Ct., 1211, 1216-1217 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 599-602 (1975). To avoid interference with legitimate ongoing state proceedings and to avoid needless duplication of litigation, this Court should abstain under Younger v. Harris.

(2)

The cases cited in Point II of appellant's supplemental brief are distinguishable. In these cases the defendant had been served with a Notice of Violation which formed the only basis of the criminal charges. The defendant was not charged, as is the case here, with

---

*Although this proceeding was originally dismissed, appellee's motion to reargue was granted last week and appellant herein was ordered to serve an answer within ten days.

violation of the underlying regulation itself. See. e.g., People v. Namro Holding Corp., 10 AD 2d 702, (1st Dept., 1960), aff'd 8 NY 2d 1131 (1960); People v. Gillman, 6 AD 2d 899 (2nd Dept., 1958). Even if we were to accept appellant's argument that the criminal proceeding involves only a violation of the violation order, not a violation of the Zoning Resolution, there is still a civil proceeding pending in state court directly concerning the Zoning Resolution itself, wherein appellant can raise the issue of constitutionality.

(3)

Appellant argues for the first time in its supplemental brief that it is not the defendant in criminal court.

Zoning Resolution §11-60 makes it a misdemeanor for the "owner, general agent, lessee or tenant" of a building to violate Zoning Resolution §81-021, the provision challenged in this action (See Appellees Brief at 4n). Therefore, Ms. Rucker, not the building, is named as the defendant in the state criminal proceeding. The charges were brought against her in her capacity as the manager and person in charge of the premises. This is clear from the caption of the information as well as a reading of its body (See also A51). Therefore, she can raise the defense of constitutionality

of the resolution.

While Ms . Rucker is named as the manager, person in charge of 133 West 45th Street, not of Regal Health Spa, they are one and the same, a fact which appellant does not challenge. Had appellant decided to sue in federal court under the address of its premises rather than by using its corporate name, this weak argument could not have been made.

CONCLUSION

The order and judgment of the District Court should be affirmed, with costs.

November 9, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel
Attorney for Defendant-Appellee

LEONARD KOERNER,
LAURENCE B. JONES,

of Counsel.

321-1M-421040(53)

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.: Raymond Escutel

being duly sworn, says, that on the 10 day of NOV., 1977

at No. 299 B'WAY in the Borough of MANH., in The City of New York, he served three copies of the annexed BRIEF, etc. upon CHARLES SUTTON Esq., the attorney for the PLTFF-APPLT. in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 10 day of NOV., 1977

Raymond Escutel

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978